No. 93-6497 (2)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

FRANK BASIL McFARLAND,

Petitioner,

v.

JAMES A. COLLINS,
Director, Texas Department
of Criminal Justice,
Institutional Division,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THIS IS A DEATH PENALTY CASE: PETITIONER IS SCHEDULED TO BE PUT TO DEATH SHORTLY AFTER 12:00 a.m. ON OCTOBER 27, 1993

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41 pp

QUESTIONS PRESENTED

1. Did the Court of Appeals err by refusing to grant Petitioner's Application for a Certificate of Probable Cause and Stay of Execution under the standard set forth by this Court in Barefoot v. Estelle, 463 U.S. 880 (1983)?

2. (a) Does a federal district court possess jurisdiction to grant a stay of execution under either 28 U.S.C. § 2251 or 28 U.S.C. § 1651(a), in order to appoint counsel for an indigent *pro se* death row inmate who has not yet filed a habeas corpus petition but who has expressed an intention to file a petition once counsel is obtained?

   (b) The Fifth, Ninth, and Eleventh Circuits have taken divergent positions on this important issue. Should this Court grant certiorari to resolve the circuit split?

3. Assuming *arguendo* that there was no statutory basis for jurisdiction to grant a stay in the instant case, did the Constitution nevertheless require the lower courts to stay Petitioner's imminent execution so that habeas counsel could be obtained for Petitioner, a *pro se* indigent death row inmate?

TABLE OF AUTHORITIES

CASES

STATUTES

MISC.

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No. _____

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PETITION FOR WRIT OF CERTIORARI
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Petitioner, **FRANK BASIL McFARLAND**, respectfully requests that the Court grant Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

CITATION TO OPINION BELOW

The United States Court of Appeals for the Fifth Circuit affirmed the order of the federal district court dismissing Petitioner's *pro se* application for a stay of execution and appointment of counsel for want of jurisdiction. See McFarland v. Collins, ___ F.3d ___ (5th Cir. October 26, 1993). A copy of the Fifth Circuit's opinion is attached as **Appendix A [The court's opinion will be forwarded as soon as it becomes available].**[1] A copy of the district court's order is attached as **Appendix B.**

JURISDICTION

On October 26, 1993, the Court of Appeals affirmed the district court's dismissal of Petitioner's *pro se* motion for a stay of execution and appointment of counsel. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254. Jurisdiction in the district court existed under 28 U.S.C. §§ 1331, 1366, 1651(a), 2241 & 2251. In the Court of Appeals, jurisdiction was invoked pursuant to 28 U.S.C. §§ 1291(a) & 2253.

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[1] As of the time that this petition is being lodged with this Court, the Court of Appeals has not yet issued an order in this case. In order to avoid a frantic last-minute preparation and filing of a certiorari petition -- assuming that the Court of Appeals denies relief -- Petitioner lodges this petition contingently. Petitioner reserves the right to supplement or amend this contingent petition in view of the Court of Appeals' ultimate holding.

CONSTITUTIONAL PROVISIONS INVOLVED

The jurisdictional issues in the case concern four federal statutes: The habeas corpus jurisdictional statute, 28 U.S.C. §2251; The All Writs Act, 28 U.S.C. § 1651(a); the Anti-Injunction Act, 28 U.S.C. § 2283; the provision in the Criminal Justice Act requiring the appointment of federal habeas counsel, 21 U.S.C. §848(q)(4)(B). Those four statutes are set forth in **Appendix c** attached hereto.

This case also implicates Petitioner's federal constitutional rights under the Eighth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, which read, in pertinent part, as follows:

Amendment VIII

> " ... [N]or [shall] cruel and unusual punishments [be] inflicted."

Amendment XIV

> " ... [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

This case also involves the Habeas Corpus Suspension Clause, Art, I, § 9, Cl. 2, which provides:

> "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

STATEMENT OF THE CASE

I. Procedural and Factual Background

In view of obvious time constraints, Petitioner will forego an extended discussion of the procedural and factual background of this case. The prior proceedings in state court are fully discussed in Petitioner's petition for writ of certiorari filed in this Court yesterday. See McFarland v. Texas, *Petition for Writ of Certiorari*, No. ____ (filed October 25, 1993). The prior proceedings in federal court are fully discussed in Petitioner's *Brief in Support of Application for Certificate of Probable Cause and Motion for Stay of Execution*, which was filed in the Court of Appeals this morning. A copy of that brief has been faxed to this Court. Accordingly, Petitioner will simply summarize the holdings of the U.S. District Court and Court of Appeals.

The district court, adopting the State's position, held that it had no jurisdiction over the case -- either to enter a stay or appoint counsel under § 848(q)(4)(B) -- because no federal habeas corpus "petition" had been filed by Petitioner. Rejecting the Ninth Circuit's analysis in Brown v. Vasquez, 952 F.2d 1164 (9th Cir. 1991), cert. denied, ___ U.S. ___ (1992), the district court held that it had no authority to appoint counsel pursuant to §848(q)(4)(B) or stay Petitioner's execution because no "post-conviction proceeding under [28 U.S.C.] section 2254" was instituted by the filing of a habeas corpus "petition." McFarland v. Collins, supra, slip op., at 2. The United States Court of Appeals affirmed the judgment of the district court. See McFarland

v. Collins, ___ F.3d ___ (5th Cir. October 26, 1993) [That opinion will be forwarded to this Court as soon as it is made available.]

II. How the Issues Were Raised and Decided Below

Petitioner filed a *pro se* motion to stay his execution in the federal district court, also requesting that the court appoint counsel pursuant to 21 U.S.C. § 848(q)(4)(B). Citing Justice Kennedy's concurrence in Murray v. Giarratano, 109 S. Ct. 2765, 2772-73 (1989), Petitioner also contended that the federal Constitution required the appointment of counsel and a stay of execution so that such counsel could adequately prepare Petitioner's habeas appeal. For authority that the district court could stay Petitioner's execution, notwithstanding the fact that a habeas petition had not yet been filed, Petitioner cited the Ninth Circuit's decision in Brown v. Vasquez, 952 F.2d 1164 (9th Cir. 1991), cert. denied ___ U.S. ___ (1992).

The district court dismissed the *pro se* motion, holding that the court lacked jurisdiction to enter a stay and appoint counsel since no habeas corpus "petition" had been filed. See McFarland v. Collins, No. 4:93-CV-714-A (N.D. Tex. October 25, 1993). The United States Court of Appeals for the Fifth Circuit affirmed, denying a stay of execution. See McFarland v. Collins, ___ F.3d ___ (5th Cir. October 26, 1993).

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE GRANTED

I. IN VIEW OF THE NINTH CIRCUIT'S DECISION IN BROWN V. VASQUEZ, PETITIONER WAS NECESSARILY ENTITLED TO A CERTIFICATE OF PROBABLE CAUSE TO APPEAL.

Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983), sets forth the standard by which federal habeas courts must judge Petitioner's Application for Certificate for Probable Cause (CPC): A CPC must be granted if reasonable jurists can differ on the issue. Because the lower courts have taken a position diametrically contrary to the Ninth Circuit, a CPC and stay of execution should be automatic. Compare McFarland v. Collins, No. 4:93-CV-714-A (N.D. Tex. October 25, 1993), aff'd ___ F.2d ___ (5th Cir. October 26, 1993), with Brown v. Vasquez, 952 F.2d 1164 (9th Cir. 1991), cert. denied, ___ U.S. ___ (1992).

In support of this argument, Petitioner cites, by analogy, this Court's retroactivity doctrine in Teague v. Lane, 489 U.S. 288 (1989), and this Court's qualified immunity doctrine, which both embody the same "reasonable person's view of the prevailing law" standard in other contexts.[2] If a federal habeas court had before it an issue of first impression in the Circuit in a case involving

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[2] In the Teague context, this central inquiry is whether the decision of a state court at the time that a criminal defendant's conviction became final was a "reasonable, good faith" interpretation of existing law. See Gilmore v. Taylor, 113 S. Ct. 2112, 2116 (1993) (citing cases). Likewise, in the qualified immunity context, the central inquiry is whether executive officials acted in an "objectively reasonable" manner at the time of the alleged constitutional violation in view of the "clearly established law." See, e.g., Anderson v. Creighton, 483 U.S. 635, 638-39 (1987) (citing cases).

the Teague doctrine, and there existed a decision of another federal circuit squarely on point rejecting the constitutional claim on the merits, the court would undoubtedly conclude that the federal habeas petitioner would be barred under Teague from raising the claim because "reasonable jurists" could differ (and indeed had differed) at the time that the defendant's conviction became final.

Similarly, in a qualified immunity case, if, at the time an executive official committed the alleged constitutional violation, there existed a decision from another federal circuit rejecting the precise constitutional claim made by a civil rights plaintiff, this Court would hold that claim was barred under the qualified immunity doctrine.

The same considerations apply in the context of an application for a certificate of probable cause. Indeed, such considerations apply *a fortiori* in cases such as the present one, since unlike cases involving Teague and qualified immunity, a court reviewing an application for CPC is faced with a necessarily quick decision under serious time constraints -- i.e., a pending execution date. In such a case, a federal habeas court cannot possibly undertake adequate research and engage in thoughtful deliberations over such a complex issue in such a short time. In this regard, the fact that at least one other federal circuit has adopted the position taken by Petitioner strongly militates in favor of granting CPC and a stay for the purpose of affording adequate time to deliberate over this issue. Thus, because the Ninth Circuit's decision in Brown v. Vasquez *ipso facto* establishes that reasonable jurists can

differ on this issue, a CPC and stay should have been granted as a matter of course.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE SPLIT IN THE CIRCUITS OVER WHETHER A FEDERAL HABEAS COURT CAN APPOINT AN INDIGENT INMATE COUNSEL UNDER 21 U.S.C § 848(q)(4)(B), NOTWITHSTANDING THE FACT THAT THE INMATE HAS NOT FIRST FILED A HABEAS CORPUS "PETITION."

A. The lower courts' refusal to stay Petitioner's execution and appoint counsel is in direct conflict with the interpretation of the federal habeas statutory scheme by the Ninth Circuit in Brown v. Vasquez, 952 F.2d 1164 (9th Cir. 1991).

Because an indigent state prisoner seeking to vacate a death sentence in "any post conviction proceeding under section 2254 ... of Title 28" is "entitled" to the appointment of one or more attorneys to represent him, 21 U.S.C. § 848(q)(4)(B), the district court erred by refusing to stay Petitioner's execution "in order to appoint counsel to assist [him] in preparing and filing a petition for federal habeas corpus relief." Brown v. Vasquez, 952 F.2d 1164 (9th Cir. 1991). The Ninth Circuit in Brown v. Vasquez was faced with a situation quite similar to the instant case -- an indigent *pro se* state inmate under a sentence of death who was unable by himself to prepare a federal habeas petition and who requested a stay of execution so that a federal district court could appoint counsel. At issue was whether the district court had jurisdiction to grant the stay and appoint counsel when a habeas "petition" had not yet been filed. The Ninth Circuit held that a federal habeas corpus court does have jurisdiction to enter a stay -- for the purpose of appointing counsel under § 848(q)(4)(b) -- even though

no habeas "petition" is filed first. See Brown, 952 F.2d at 1166-69.[3]

Rejecting the state's argument that 28 U.S.C. § 2251 afforded a federal habeas corpus court no jurisdiction to enter a stay unless a habeas corpus "petition" was filed, the Brown court held that the Great Writ must be "'administered with the initiative and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected.'" Brown, 952 F.2d at 1166 (quoting Harris v. Nelson, 394 U.S. 286, 290-91 (1969)). As the court reasoned:

> If a district court can appoint counsel to represent a death penalty habeas petitioner, surely it can issue a stay of execution when necessary to make the appointment and allow appointed counsel reasonable time to do his job. Otherwise, the petitioner could be executed before appointed counsel could be found or before that counsel could undertake the task for which he was appointed. The habeas process need not tolerate the possibility of such a perverse absurdity."

Brown, 952 F.2d at 1169. The Ninth Circuit further stated that:

> the underlying purpose of the writ of habeas corpus requires us to view the application for the appointment of counsel to assist in the preparation of a death penalty prisoner's habeas corpus petition as an integral part of the habeas corpus process under [the federal habeas corpus statutes].

Id. In reaching this decision, the court also took into account the tremendous obligations of habeas counsel in a death penalty case:

[3] It should be noted that the instant case presents an even more compelling situation than Brown. In Brown, the *pro se* federal habeas petitioner had been represented by counsel in his state habeas appeals. See Brown, 952 F.2d at 1164. Petitioner, conversely, has had no representation in any post-conviction proceedings, state or federal.

> [A] prisoner applying for habeas corpus relief in federal court must assert all possible violations of his constitutional rights in his initial application or run the risk of losing what might be a viable claim. This is a substantial burden. Compounding this burden, the petitioner is often illiterate or poorly educated and yet must decipher a complex maze of jurisprudence in order to determine which of his constitutional rights, if any, may have been violated. Such a task is "difficult even for a trained lawyer to master," and, understandable, is often beyond the abilities of most prisoners. Murray v. Giarrantano, 492 U.S. 1, 28, 109 S.Ct. 2765, 2780, 106 L.Ed.2d 1 (1989) (Stevens, J., dissenting).

952 F.2d at 1167.[4]

The district court in the present case erred by failing to reach the same conclusion. The district court instead relied on the Eleventh Circuit's decision in In re Lindsey, 875 F.2d 1502 (11th Cir. 1989). Although that particular case is inapposite to the issue presented here,[5] Petitioner recognizes that another decision by the Eleventh Circuit in the same litigation did hold --

[4] The Ninth Circuit is not alone in this position. See also Mooney v. Collins, No. 6:92CV254, slip op. at 2 (E.D. Tex. April 30, 1992) (quoting Brown v. Vasquez, 952 F.2d at 1165); Steffen v. Tate, No. C-1-92-495, slip op., 3-4 (S.D. Ohio June 18, 1992) ("The Court is faced with the imminent prospect that unless it acts promptly to grant petitioner's request, [for a stay] petitioner will be executed without ever obtaining federal review of his constitutional claims. The Court strongly believes that petitioner is entitled to such review, and nothing in McCleskey or any other decisions of the United States Supreme Court is to the contrary.").

[5] In that case, the court held that 28 U.S.C. § 848(q)(4)(B) did not require the appointment of federal habeas counsel for the preparation of claims that had not yet been exhausted in the state courts. That is, the court held that federal monies should not be expended for state court litigation in capital habeas cases. See 875 F.2d at 1504-06. That case thus does *not* hold that § 848 does not require the appointment of federal habeas counsel until a federal habeas petition is formally filed. Rather, Lindsey's holding is rooted in the habeas corpus "exhaustion" doctrine, which is not at issue in the present case.

after offering only a scant analysis, unlike the Ninth Circuit's thorough analysis of the issue -- that a federal habeas court has no jurisdiction to enter a stay and appoint counsel under 21 U.S.C. § 848(q)(4)(B) unless a habeas corpus "petition" is first filed. See In re Lindsey, 875 F.2d 1518, 1519 (11th Cir. 1989).[6] Petitioner contends that the Eleventh Circuit's position is erroneous and that the Ninth Circuit's position is the correct one for the reasons stated in Brown v. Vasquez, supra.

Thus, in the instant case, the district court had jurisdiction under 28 U.S.C. § 2251 to enter a stay pending the obligatory appointment of federal habeas counsel pursuant to 21 U.S.C. § 848(q)(4)(B). This Court should grant certiorari in order to resolve the division among the lower federal courts on this important issue regarding the administration of federal habeas corpus.

B. 21 U.S.C. § 848(q)(4)(B) *requires* federal habeas courts to appoint indigent state court capital defendants counsel on habeas corpus review; a stay of execution should be granted as a necessary concomitant.

21 U.S.C. § 848(q)(4)(B), a part of the Criminal Justice Act, required the district court to stay Petitioner's imminent execution and appoint permanent habeas counsel. The plain language of that statute unequivocally *required* the district court to appoint Petitioner, who is an indigent, post-conviction counsel who can undertake genuine representation of Petitioner's case. See id.

[6] That case was not cited by the federal district court.

("In any post conviction proceeding under section 2254 . . . of Title 28, seeking to vacate or set aside a death sentence, any defendant who is . . . financially unable to obtain adequate [legal] representation . . . or other reasonably necessary services *shall be entitled* to the appointment of one or more attorneys . . . . ") (emphasis added). Although the legislative history of § 848(q)(4)(B) is largely non-existent,[7] there is no indication that Congress intended the appointment of habeas counsel for indigents to be discretionary.

Furthermore, common sense supports Petitioner's arguments: One must asks how, if Congress intended the district court to appoint him permanent counsel so that he may challenge his state court death sentence on federal constitutional grounds, can Petitioner meaningfully do so if he is put to death before his counsel has an opportunity do anything on his behalf because no court will stay his imminent execution? Cf. Brown v. Vasquez, 952 F.2d 1164, 1169 (9th Cir. 1991), cert. denied, ___ U.S. ___ (1992).

[7] There is no legislative report of any type, nor does there to appear to be any meaningful debate on the floor of either House of Congress regarding this provision. See Pub. L. No. 100-690, 1988 U.S. CODE & CONG. AND ADMIN. NEWS, p. 5937. Interestingly, a *subsequent* bill offered in the Senate by various Republican Senators attempted to amend this provision in order to afford discretion to federal judges in the appointment of counsel for post-conviction habeas appeals of state court capital defendants. See 135 CONG. RECORD (Senate) S7260, S7264, S7273. The language of the proposed statute provided that: "In a proceeding under section 2254 of Title 28, United States Code, relating to a state capital case, or any subsequent proceeding on review, appointment for a petitioner who is or becomes financially unable to afford counsel *shall be in the discretion of the court*. . ." (emphasis added). *This proposed legislation never passed.*

As another federal habeas court has observed regarding 21 U.S.C. 848q(4)(B):

> There is no dispute that as a result of [McCleskey v. Zant, 111 S. Ct. 1454 (1991)],[8] it is now "reasonably necessary" for [federal habeas] counsel [appointed under this statute] to investigate and present all claims in the first [federal habeas] petition. McCleskey made clear that attorneys must raise all claims, not merely those claims known to the petitioner at the time of filing [a habeas petition], but also those claims that a reasonable investigation would have revealed. *Faced with this obligation, an attorney must review the record, conduct a preliminary factual investigation, and ensure that all claims for relief have been uncovered and evaluated.*

Coleman v. Vasquez, 771 F. Supp. 300, 302 (N.D. Cal. 1991) (emphasis added).[9]

In this case, there has been absolutely nothing but a last-minute cursory review of the record by a single Texas Resource Center attorney and no post-conviction factual investigation by anyone. Because the Texas courts have refused to stay Petitioner's imminent execution and appoint state habeas counsel to raise federal constitutional claims not exhausted on direct appeal, the federal habeas courts have no choice but to stay Petitioner's execution in order to carry out the obvious purpose of 21 U.S.C. § 848(q)(4)(B).

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[8] In McCleskey, this Court effectively restricted state court defendants to a single federal habeas appeal in the vast majority of cases.

[9] It is noteworthy, however, that the Fifth Circuit has suggested that a court-appointed habeas attorney must be given sufficient time to prepare a case. See Duff-Smith v. Collins, 973 F.2d 1175, 1179-80 (5th Cir. 1992).

C. The All Writs Act provided the district court with authority to enter a stay of execution so that habeas counsel could be appointed.

Assuming *arguendo* that the district court did not possess jurisdiction under either 28 U.S.C. § 2251 or 21 U.S.C. § 848(q)(4)(B), the district court nevertheless had jurisdiction to stay Petitioner's execution under the All Writs Act, 28 U.S.C. 1651(a). That statute provides that, "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." That jurisdictional statute permits a federal court to issue a stay or injunction even before jurisdiction formally vests in the court in order to preserve jurisdiction. See ITT Community Develop. Corp. v. Barton, 569 F.2d 1351, 1359 n.19 (5th Cir. 1978). As the court stated in ITT, "[a] federal court has the power under the All Writs Act to issue injunctive orders in a case even before the court's jurisdiction has been established. When potential jurisdiction exists, a federal court may issue status quo orders to ensure that once its jurisdiction is shown to exist, the court will be in a position to exercise it." Id.; see also Merrimack River Savings Bank, 219 U.S. 527, 534 (1911) (injunction is always appropriate simply to preserve the status quo or subject matter of a case). In Brown v. Vasquez, supra, the federal district court stayed the *pro se* capital habeas petitioner's execution under the All Writs Act. See Brown v. Vasquez, 743 F. Supp. 729, 732 (C.D. Cal. 1990), aff'd

on other grounds, 952 F.2d 1164 (9th Cir. 1991), cert. denied, ___ U.S. ___ (1992).

In Brown, the state argued that the All Writs Act was inapplicable to a capital habeas petitioner's *pro se* motion seeking a stay of execution and appointment of counsel in view of the Anti-Injunction Act, 28 U.S.C. § 2283, which provides that, as a general rule, federal courts should not stay state proceedings. However, there are three statutory exceptions contained in § 2283: (i) when there are other congressional statutes that permit injunctions or stays of state court proceedings, (ii) "where [stays are] necessary in aid of [a federal court's jurisdiction," and (iii) when stays are necessary "to protect or effectuate [federal] judgments." See Younger v. Harris, 401 U.S. 37, 43 (1971). The second exception is obviously relevant to the instant case, in that it essentially adopts the All Writs Act. See Atlantic Coast Line R.R. Co. v. Brotherhood of Local Eng., 398 U.S. 281, 294-95 (1970). In Atlantic Coast Line, this Court, in construing the second exception, held that "some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration and disposition of a cases as to seriously impair the federal court's flexibility and authority to decide that case." Id. at 295; see also Henry v. First Nat'l Bank of Clarksdale, 595 F.2d 291, 306 (5th Cir. 1979).

D. As a matter of equity and fairness, this Court should stay Petitioner's imminent execution so that he may, with the assistance of counsel, meaningfully exercise his statutory right to file a federal habeas corpus petition.

Petitioner asks this Court, in ruling on his various statutory claims, to consider the larger equities at issue here. See Kuhlmann v. Wilson, 477 U.S. 436, 447 (1986) (habeas corpus "traditionally been regarded as governed by equitable principles"). A first-time capital habeas petitioner does not merit such expedited treatment, particularly when he has not actually been represented by an attorney. As this Court recently held, federal habeas corpus -- at least regarding a petitioner's initial appeal -- is alive and well. See Wright v. West, 112 S. Ct. 2482 (1992). This is not a case where a federal habeas petitioner has abused the habeas process or otherwise acted in a dilatory manner. Indeed, Petitioner's direct appeal certiorari petition was denied by this Court in June of this year.[10]

III. ASSUMING *ARGUENDO* THAT THE LOWER COURTS LACKED A STATUTORY BASIS OF JURISDICTION TO STAY PETITIONER'S EXECUTION, VARIOUS CONSTITUTIONAL GUARANTEES REQUIRED THE COURTS TO STAY PETITIONER'S EXECUTION SO THAT COUNSEL COULD BE OBTAINED.

The next set of claims raised by Petitioner assume *arguendo* that the district court lacked a statutory basis of jurisdiction under 28 U.S.C. § 2251 and, moreover, that the Anti-Injunction Act

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[10] Even critics of the previously slow pace of capital habeas corpus proceedings have never suggested that such expedited habeas procedures are appropriate. See, e.g., Judge Edith H. Jones, *Death Penalty Procedures: A Proposal for Reform*, 53 TEX. B. J. 850, 851-52 (1990).

operated in a manner so as to prevent the district court from granting a stay pursuant to the All Writs Act.

Even if that were the case, the lower courts' refusal to stay Petitioner's imminent execution, so that counsel could be recruited or appointed, violated a number of different constitutional provisions. Because the Anti-Injunction Act would be the linchpin of any refusal to find jurisdiction -- assuming that the district court lacked a statutory basis to stay Petitioner's execution[11] -- this Court must ask whether the Anti-Injunction Act could ever operate in an unconstitutional manner.

In the case of an indigent *pro se* state-court inmate under the sentence of death who seeks to challenge his conviction and sentence in a federal post-conviction proceeding, the Constitution requires that a federal court temporarily stay his execution until counsel can be obtained so that the inmate's federal right to a habeas corpus appeal may be pursued in a meaningful fashion. See generally Laurence Tribe, AMERICAN CONSTITUTIONAL LAW, § 3-5, 42-61 (2d ed. 1988) (discussing this Court's jurisprudence regarding the question of whether a congressional statute can unconstitutionally deprive federal courts jurisdiction over a particular case or controversy). In particular, as discussed infra, the federal constitutional right to "access to the courts" and the constitutional proscription against the suspension of habeas corpus

[11] That is, unquestionably the All Writs Act or a federal court's inherent authority to issue an injunction or stay to preserve the subject matter of a case would supply the basis for staying Petitioner's execution but for the Anti-Injunction Act.

take precedence over the operation of a federal jurisdictional statute such as the Anti-Injunction Act.

One other point should be made here. Although Petitioner is specifically attacking the constitutionality of an action by a *federal* habeas court, the larger constitutional issues implicated here -- the right to meaningful access to habeas counsel and a meaningful post-conviction review -- concern the actions of both the state *and* federal habeas courts. See Murray v. Giarratano, 109 S. Ct. 2765, 2773 (1989) (Kennedy, J., concurring joined by O'Connor, J.) (although § 1983 action attacked constitutionality of state's denial of habeas counsel, concurring opinion discussed role of "Congress and state legislatures" in providing counsel). Indeed, of any judicial action, a habeas corpus action attacking a state court criminal conviction integrally involves both the state and federal courts. This Court's modern habeas corpus jurisprudence underscores the intimate relationship between state and federal habeas courts. See, e.g., Rose v. Lundy, 455 U.S. 509 (1982) (federal habeas "exhaustion" doctrine); Stone v. Powell, 428 U.S. 465 (1976) (Fourth Amendment claim cannot be raised on federal habeas review if "full and fair" opportunity to litigate the claim in state court). Thus, in evaluating Petitioner's claims here, this Court should consider the actions of the Texas habeas courts in the instant case.

A. The refusal of the state courts and the lower federal courts to stay Petitioner's execution and appoint counsel violated Petitioner's federal constitutional right of access to the courts.

In Murray v. Giarratano, 109 S. Ct. 2765 (1989), six Members of this Court recognized that the federal constitutional right of "access to the courts" could, in a given case, require habeas courts to appoint an indigent capital defendant counsel to pursue post-conviction habeas appeals. See id. at 2772 (O'Connor, J., concurring); id. at 2772-73 (Kennedy, J., concurring, joined by O'Connor, J.); id. at 2773-75 (Stevens, J., dissenting, joined by Brennan, Marshall & Blackmun, JJ.); but see id at 2771-72 (plurality). The concurrences of Justice O'Connor and Kennedy -- which recognized that at least in some capital habeas cases petitioners may have a constitutional right to habeas counsel as a part of the larger constitutional right of "access to the courts" -- must be treated as the "holding" of the Court, rather than the contrary position of the plurality.[12]

In Giarratano, Justices O'Connor and Kennedy believed that the Supreme Court's seminal "right to counsel" case, Bounds v. Smith, 430 U.S. 817 (1977), might require the appointment of counsel for an indigent capital habeas petitioner. See Giarratano, 109 S. Ct.

[12] The established rule in this Court is that where no single rationale supporting the result commands a majority of the Court, "'the ["]holding["] of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.'" Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (joint opinion)); see also City of Lakewood v. Plain Dealer, 486 U.S. 750, 765-66 n.9 (1988) (same).

at 2272-73 (Kennedy, J., concurring, joined by O'Connor, J.). In Bounds, the Court held "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance by persons trained in law." Bounds, 430 U.S. at 828.

In the proceedings below in the instant case, Petitioner, an indigent *pro se* habeas petitioner under sentence of death, was unable to utilize the law library provided to him by the Texas Department of Criminal Justice because of a lack of education and training. Nor did the state executive or legislative branches, the state courts, or the lower federal courts provide Petitioner with any type of legal assistance in this case so as to enable him to benefit from access to the law library.[13] See, e.g., Ex Parte McFarland, *Motion to Stay Execution Date to Allow Defendant to Obtain an Attorney to Prepare and File a Post-Conviction Application for Writ of Habeas Corpus*, at 2 (filed in Texas Court of Criminal Appeals on October 21, 1993). Finally, the assistance of inmate "writ writers" was not a viable means of affording

[13] Although the Texas Department of Justice, Institutional Division (formerly the "Texas Department of Corrections") in prior years provided limited assistance from staff counsel for unrepresented inmates on Texas' death row who wished to file habeas corpus appeals, the State has discontinued providing such services for new inmates since the late 1980s, although staff counsel have continued to represent a small number of inmates whose representation began in prior years. Petitioner is not among those few inmates. The State's refusal to provide death row inmates further assistance from staff counsel in habeas appeals beginning in the late 1980s coincided with the creation of the Texas Resource Center in 1988.

Petitioner access to the courts, cf. Johnson v. Avery, 393 U.S. 483 (1969), as Texas proscribes the practice of law except by licensed attorneys. See TEXAS GOV'T CODE § 81.102 (1993); id. § 81.101(a) (defining "practice of law" as including "preparation of a pleading or other document incident to a[] [legal] action"); see also Grievance Comm. of State Bar v. Dean, 190 S.W.2d 126 (Tex.Civ.App. 1945). The only way to have provided Petitioner meaningful access to the courts was either to appoint counsel, or at the very least, stay his execution for a reasonable amount of time, so that Petitioner himself, with the assistance of the Texas Resource Center, could obtain *pro bono* counsel. Because the state courts and lower federal courts did neither of these things, Petitioner's federal constitutional right of access to the courts to pursue a post-conviction appeal was violated.

B. Petitioner's federal constitutional right to habeas counsel was violated by the state courts and the lower federal courts.

Although a plurality of this Court in Murray v. Giarratano, 109 S. Ct. 2765 (1989), held that there was no constitutional right to habeas counsel in capital cases under any circumstances,[14] a majority of the Court has never squarely decided that question. Notably, in his concurrence, Justice Kennedy, joined by Justice O'Connor, stated that "no prisoner on death row in Virginia has

[14] Like Justice O'Connor's concurrence in Giarratano, Petitioner distinguishes between the constitutional right to counsel *per se* in habeas cases and the distinct constitutional right of "access to the courts." See Giarratano, 109 S. Ct. at 2772 (O'Connor, J., concurring).

been unable to obtain counsel to represent him in postconviction proceedings . ... I am not prepared to say that this scheme violates the Constitution. *On the facts of this case*, I concur in the judgment of the Court." Giarratano, 109 S. Ct. at 2773 (emphasis added).

Because the four Justices who dissented in Giarratano contended that there was a federal constitutional right to counsel for indigent death row inmates in post-conviction proceedings, see id. at 2773 (Stevens, J., dissenting, joined by Brennan, Marshall & Blackmun, JJ.), a total of six Members of the Court in Giarratano believed that, *at least in some cases*, a death row inmate has a constitutional right to habeas counsel. In terms of precedential value, Justice Kennedy's concurrence, rather than the plurality's opinion, must be treated as the opinion of the Court. See Marks v. United States, supra.[15] It is also notable that the plurality opinion in Giarratano has been widely criticized by commentators.[16]

[15] How Justice O'Connor voted in Giarratano is somewhat unclear. Although she joined the plurality opinion, she also separately concurred and additionally joined in Justice Kennedy's separate concurring opinion. See Giarratano, 109 S. Ct. at 2772 (O'Connor, J., concurring); id. 2772-73 (O'Connor, J., joining opinion of Kennedy, J., concurring). In view of the Supreme Court's well-established rule that the *pivotal concurrence on the narrowest grounds* is to be treated as the "holding" of the Court in a case where no single rationale commands a majority of the Court, presumably Justice O'Connor's joining Justice Kennedy's concurring opinion represents Justice O'Connor's vote in Giarratano.

[16] See, e.g., James S. Liebman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 7.2, at 37 (1991 Supp.); Scott E. Rogers, Note, *Constitutional Law/Access to the Courts--Limiting the Relief Available to Death Row Inmates Denied Meaningful Access to the Courts*, 17 FLA. ST. L. REV. 399 (1990); Alice McGill, Comment, *Murray v. Giarratano: Right to Counsel in Postconviction*

The instant case is clearly distinguishable from the facts in Giarratano. As discussed at length in Petitioner's various *pro se* motions filed in the state and federal habeas courts -- including the letters from the Texas Resource Center to the lower courts attached thereto, which are part of the record -- indigent capital defense in Texas is in a state of crisis.[17] Unlike the situation in Virginia in the mid to late 1980s, current conditions in Texas have resulted in numerous death row inmates, such as Petitioner, being "unable to obtain counsel to represent [them] in postconviction proceedings." Giarratano, 109 S. Ct. at 2773 (Kennedy, J., concurring, joined by O'Connor, J.).

As the record reveals, there are approximately *seventy* inmates on Texas' death row who are in the post-conviction phase and who are unrepresented by habeas counsel. A significant number of those unrepresented inmates, including Petitioner, have active execution dates. Although state habeas trial courts in Texas apparently have the discretion to appoint indigent inmates habeas counsel under a state statute,[18] it is beyond dispute that such discretionary

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Proceedings in Death Penalty Cases, 18 HAST. CONST. L.Q. 211 (1990); Brian L. McDermott, Comment, *Defending the Defenseless*, 75 IOWA L. REV. 1305 (1990); Geraldine S. Moohr, Note, Murray v. Giarratano: *A Remedy Render a Meaningless Ritual*, 39 AMER. U. L. REV. 765 (1990); Donald Zeitham, Note, *Constitutional Right to State Capital Collateral Review: The Due Process of Executing a Convict Without Attorney Representation*, 80 J. CRIM. L. & CRIMINOLOGY 1190 (1990).

[17] Notably, neither the state courts, the federal district court, nor the State has disputed any of Petitioner's factual allegations regarding the crisis in indigent defense in Texas capital habeas cases.

[18] See TEX. CODE CRIM. PRO. Arts. 26.04 & 26.05 (Vernon 1993).

21 U.S.C. §848(q)(4)(B)

In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

28 U.S.C. §1651(a)

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. §2251

A justice or judge of the United States before whom a habeas corpus proceeding is pending may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.

28 U.S.C. §2283

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

APPENDIX A

23, 1993. On June 7, 1993, Judge Drago, sitting for Judge Leonard, ordered McFarland's execution date changed to October 27, 1993. On October 22, 1993, McFarland filed the motions presently before the court.

Pursuant to 21 U.S.C. § 848 (q)(4)(B) a defendant in any post-conviction proceeding under 28 U.S.C. § 2254 or § 2255 who is or becomes financially unable to obtain adequate representation is entitled to the appointment of one or more attorneys. In the instant case, however, McFarland is not entitled to such an appointment because there is not "a post-conviction proceeding under section 2254 or 2255 of Title 28" pending. Only when McFarland files such a petition (in complies with applicable federal and local rules) will the court have authority to grant the motions, if appropriate. In Re Lindsey, 875 F.2d 1502, 1504 (11th Cir. 1989). Moreover, because there is not a pending habeas corpus proceeding, the court has no jurisdiction to enter a stay of execution or grant in forma pauperis status. Narvaiz v. Collins, No. SA4-93-CA-0311 (W. D. Tex. April 21, 1993). McFarland has not provided the court with the "information and materials necessary to make a careful assessment of the merits" to determine whether a stay is warranted. Barefoot v. Estelle, 463 U.S. 880, 896 (1983). Therefore,

The court ORDERS that the motions of McFarland (i) for stay

of execution and request for appointment of counsel and (ii) for leave to proceed in forma pauperis be, and are hereby, denied.

SIGNED October 25, 1993.

JOHN McBRYDE
United States District Judge

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-1954

FRANK BASIL MCFARLAND,

Petitioner,

VERSUS

JAMES A. COLLINS,
Director, Texas Department of Criminal Justice,
Institution Division,

Respondent.

ON MOTION FOR STAY OF EXECUTION AND APPOINTMENT OF COUNSEL

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:

Frank B. McFarland seeks in forma pauperis status and a certificate of probable cause to review the district court's denial of his application for a stay of execution and for the appointment of counsel to represent him in the filing and prosecution of a complaint for habeas relief. He also seeks from this Court a stay of execution.

We grant IFP but deny certificate of probable cause.

The only post conviction relief petitioner has sought in state court has been a number of motions to stay court ordered executions to permit the petitioner to obtain habeas counsel. The final motion for stay was denied by the Texas Court of Criminal Appeals on October 22. Thus, no post-conviction claims have been filed in state court alleging specific constitutional infirmities in his state court conviction and sentence. The only pleadings McFarland

has filed in federal district court is a motion for stay of the state court ordered execution and request for appointment of counsel and a request for certificate of probable cause. McFarland seeks review of the district court's denial of those motions.

A Petitioner does not have a right to an automatic stay pending the filing of his first habeas corpus petition. Autry v. Estelle, 464 U.S. 1, 2 (1983). A United States Court may not stay proceedings in a state court except as expressly authorized by act of Congress, or where necessary in aid of its jurisdiction, or to perfect or effectuate its judgments. 28 U.S.C. § 2283. Such an act of Congress exists in the form of 28 U.S.C. § 2251, but it authorizes stay only by a court before which a habeas corpus proceeding is pending. No habeas corpus proceeding was pending before the district court and none is pending here. A suit is pending when commenced. In Re Connaway, 178 U.S. 421, 427-28 (1900). Federal Rule of Civil Procedure 3 makes it clear one commences a civil proceeding by filing a complaint with the court. That has not been done. We do not view the motion for stay and for appointment of counsel as the equivalent of an application for habeas relief. Brown v. Vasquez, 952 F.2d 1164, 1166 (9th Cir. 1991), cert. denied, 112 S.Ct. 1778 (1992). We do not, however, share the view of the Ninth Circuit in Brown that the filing of the motions at issue is sufficient to meet the requirement of § 2251 that a habeas proceeding be "pending" before we may stay state court proceedings. Brown, 952 F.2d at 1169. In fact, all of the "pro se" filings in this matter, which were prepared by the Texas

Resource Center, show clearly that no habeas action is pending in any court.

Were we, by some legal alchemy, to ignore the foregoing, Appellant still could not prevail. He does not make the minimal showing necessary to establish entitlement to a stay. Appellant argues that he is entitled to appointment of counsel, and appointed counsel will require additional time to prepare the habeas petition. There is, however, no constitutional right to court appointed counsel in state post-conviction proceedings. Coleman v. Thompson, 111 S.Ct. 2546 (1991); Murray v. Giarratano, 492 U.S. 1 (1989). We are not prepared to accept the blanket assertion that, in this case, meaningful access to the courts necessarily means court appointed counsel. Id.

Additionally, to be entitled to a stay, Appellant must show, if not a probability of success on the merits, at least a substantial case on the merits when a serious legal question is involved. Byrne v. Roemer, 847 F.2d 1130, 1133 (5th Cir. 1988). Appellant has not even indicated the issues that might be raised in a habeas application, much less shown a substantial case on the merits. Barefoot v. Estelle, 463 U.S. 880, 895 (1983).[1]

[1] There is yet another problem not addressed by any of Appellant's filings: the question of exhaustion of state remedies. Petitioner must exhaust state habeas remedies before he is entitled to relief on a federal habeas petition. 22 U.S.C. § 2254(b) (West 1985); In Re Lindsey, 875 F.2d 1502, 1506 (11th Cir. 1989). The numerous attachments to the papers filed show not only that no claims have been exhausted; but no post conviction claims have even been filed in state court. Thus, even if McFarland's pleadings are characterized as a federal habeas petition, the district court would be obliged to dismiss it for failure to exhaust the claims.

Accordingly the application for certificate of probable cause is denied. The motion for stay of execution and appointment of counsel is also denied.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

FRANK BASIL MCFARLAND	§	
	§	
Petitioner,	§	
	§	
VS.	§	NO. 4:93-CV-714-A
	§	
JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION	§	
	§	
Respondent.	§	

O R D E R

Came on to be considered in the above styled and numbered action the motions of petitioner, Frank Basil McFarland ("McFarland"), (i) for stay of execution and request for appointment of counsel and (ii) for leave to proceed in forma pauperis. After having considered the motions and the response of respondent the court finds that the motions should be denied.

On November 15, 1989, McFarland was convicted of capital murder and sentenced to death in the Criminal District Court Number Three of Tarrant County, Texas, the Honorable Don Leonard presiding. McFarland's conviction was affirmed by the Texas Court of Criminal Appeals. McFarland v. State, 845 S.W.2d 824 (Tex. Crim. App. 1992). On June 6, 1993, McFarland's petition for writ of certiorari to the United States Supreme Court was denied. McFarland was represented by counsel at each of the above mentioned stages. On August 16, 1993, Judge Leonard entered an order scheduling McFarland's execution for September

23, 1993. On June 7, 1993, Judge Drago, sitting for Judge Leonard, ordered McFarland's execution date changed to October 27, 1993. On October 22, 1993, McFarland filed the motions presently before the court.

Pursuant to 21 U.S.C. § 848 (g)(4)(B) a defendant in any post-conviction proceeding under 28 U.S.C. § 2254 or § 2255 who is or becomes financially unable to obtain adequate representation is entitled to the appointment of one or more attorneys. In the instant case, however, McFarland is not entitled to such an appointment because there is not "a post-conviction preceding under section 2254 or 2255 of Title 28" pending. Only when McFarland files such a petition (in complies with applicable federal and local rules) will the court have authority to grant the motions, if appropriate. In Re Lindsey, 875 F.2d 1502, 1504 (11th Cir. 1989). Moreover, because there is not a pending habeas corpus proceeding, the court has no jurisdiction to enter a stay of execution or grant in forma pauperis status. Narvaiz v. Collins, No. SA4-93-CA-0311 (W. D. Tex. April 21, 1993). McFarland has not provided the court with the "information and materials necessary to make a careful assessment of the merits" to determine whether a stay is warranted. Barefoot v. Estelle, 463 U.S. 880, 896 (1983). Therefore,

The court ORDERS that the motions of McFarland (i) for stay

of execution and request for appointment of counsel and (ii) for leave to proceed in forma pauperis be, and are hereby, denied.

SIGNED October 25, 1993.

JOHN McBRYDE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

FRANK BASIL McFARLAND,	§	
	§	
Petitioner,	§	
	§	
VS.	§	NO. 4:93-CV-714-A
	§	
JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION	§	
	§	
Respondent.	§	

O R D E R

FRANK BASIL MCFARLAND, who has been designated "Petitioner" in the above numbered proceeding, has filed in such proceeding a document entitled "Pro Se Application for Certificate of Probable Cause to Authorize Appeal and Certification that Appeal is in Good Faith" (hereinafter "Application") and another document entitled "Motion for Leave to Proceed In Forma Pauperis on Appeal" (hereinafter "Motion"). The Application states that it is being made pursuant to 28 U.S.C. § 2253. Section 2253 applies only to "a habeas corpus proceeding before a circuit or district judge". The proceeding docketed as 4:93-CV-714-A on the docket of this court is not now, and has never been, a habeas corpus proceeding. This was made clear by the order signed by the court October 25, 1993. Thus, the Application should not have been filed in this proceeding. Therefore,

The court ORDERS that the Application be, and is hereby, stricken from the record of No. 4:93-CV-714-A.

For the reasons stated in the order signed by the court October 25, 1993, the Motion should be denied. Therefore,

The court ORDERS that the Motion be, and is hereby, denied.

THE COURT SO ORDERS.

SIGNED October 26, 1993.

JOHN MCBRYDE
United States District Judge